Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rates for Interstate Inmate Calling Services	)	WC Docket No. 12-375
	)	
_____	)	

PETITION FOR RECONSIDERATION OF GLOBAL TEL*LINK CORPORATION

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SUMMARY

Pursuant to section 405(a) of the Communications Act of 1934, as amended (the "Act") and section 1.429 of the Federal Communications Commission's ("Commission" or "FCC") rules, Global Tel*Link Corporation ("GTL"),[1] by its attorneys, respectfully files this Petition for Reconsideration ("Petition"), requesting that the Commission reconsider a portion of its *Report and Order* in the above-captioned proceeding.[2]

The *Report and Order* promulgates a new rule with respect to inmate calling services ("ICS") providers' classification of calls: namely, that whether a call is interstate or intrastate for purposes of the Commission's ancillary-charges rules "depends on the physical location of the endpoints of the call and not on whether the area code or NXX prefix of the telephone number . . . are associated with a particular state"[3] (the "Rule"). The Rule is both substantively and procedurally flawed and must be stricken from the *Report and Order*.

First, in substance the *Report and Order* constitutes an exercise in unreasonable rulemaking. The *Report and Order* fails to fully assess the scope of the "end-to-end" jurisdictional analysis upon which its conclusions regarding the use of NPA-NXX codes relies. This constitutes discrimination with respect to all other similarly situated telecommunications service providers. Both ICS providers and non-ICS providers may and do use the same proxies for determining a call's nature for rating purposes. Yet only the former are now directed to abandon them, despite factual and legal conclusions that apply to all telecommunications service providers and the

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[1] This Petition for Reconsideration is filed by GTL on behalf of itself and its wholly owned subsidiaries that also provide inmate calling services: DSI-ITI, Inc., Public Communications Services, Inc., Telmate, LLC, and Value-Added Communications, Inc.

[2] Report and Order and Fourth Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, 35 FCC Rcd 8485 (2020) ("*Report and Order*").

[3] *Report and Order* ¶ 53.

telecommunications industry as a whole. Relatedly, the *Report and Order* fails to assess the ability of ICS providers to implement the Rule, given a reliance on third-party proxy arrangements that stretches back decades. Finally, the *Report and Order* may compromise the continued viability of state programs funded through assessments on intrastate calls.

Second, the *Report and Order* ignores black-letter law concerning the notice required in advance of substantive rulemaking. The questions posed in the *Public Notice*[4] that solicited comment on the treatment of ancillary service charges provided no indication that the *Report and Order* would promulgate this new and unprecedented Rule. The *Public Notice* sought proposals on the jurisdictional treatment of ancillary service charges, *not* on the classification of the *calls* that lead to such charges. Some commenters and the Commission have engaged in a tortuous chain of inferences and suppositions to attempt to remedy this error, but those attempts are unavailing. The *Report and Order*'s belated effort to rehabilitate this flawed rulemaking procedure is contrary to extensive and long-standing legal authority. The failure to observe administrative rulemaking requirements impermissibly deprived many stakeholders of the opportunity to offer meaningful and substantive input on the conclusions allegedly supporting the Rule. This failure goes to the heart of the entire reason behind notice-and-comment rulemaking requirements. It cannot be cured by post hoc rationalizations.

Any one of these flaws is sufficient to mandate a re-examination of the *Report and Order*. For both procedural and substantive reasons, the Rule must be reconsidered.

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[4] Public Notice, *Wireline Competition Bureau Seeks to Refresh the Record on Ancillary Service Charges Related to Inmate Calling Services,* 35 FCC Rcd 189 (2020) ("*Public Notice*").

I. INTRODUCTION

Per section 405(a) of the Act and section 1.429 of the Commission's rules, GTL files this Petition seeking reconsideration of a portion of the *Report and Order* in the above-captioned proceeding.

II. BACKGROUND

On February 19, 2020, the Wireline Competition Bureau ("WCB") issued a *Public Notice* that sought "specific comment on whether each permitted ICS ancillary service charge may be segregated between interstate and intrastate calls and, if so, how," as well as "comment on how the Commission should proceed in the event any permitted ancillary service is 'jurisdictionally mixed' and cannot be segregated between interstate and intrastate calls."[5] This inquiry proceeded from the D.C. Circuit's 2017 decision in *Global Tel*Link v. FCC*, which directed the Commission to give "further consideration" to whether "ancillary fees can be segregated between interstate and intrastate calls."[6]

On August 7, 2020, the Commission issued the *Report and Order*, which examined the five permissible types of ancillary service charges under its rules.[7] Single-Call Service (and Related Service) Fees, it held, could be classified as interstate or intrastate due to their association with specific telephone calls.[8] Automated Payment Fees, Third-Party Financial Transaction Fees, and Live Agent Fees could not, as they prospectively fund consumer accounts that can be used to place interstate or intrastate calls, rendering jurisdictional segregation

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5 WC Docket No. 12-375, *Rates for Interstate Inmate Calling Services*, FCC 20-111, ¶ 52 (rel. Aug. 7, 2020).

6 866 F.3d 397, 415 (D.C. Cir. 2017) ("*GTL*").

7 *See* 47 CFR §§ 64.6000(a), 64.6020(b).

8 *See Report and Order* ¶ 34.

impractical, if not impossible.[9] Paper Bill Fees were deemed jurisdictionally mixed on similar grounds.[10]

The Commission then considered "whether it is possible for inmate calling services providers to classify the jurisdiction of certain calls and thus the jurisdiction of the services ancillary to such calls." Citing disparate comments by GTL and Securus Technologies ("Securus") on the one hand – which maintained that ICS calls can be classified as interstate or intrastate according to their points of origination or termination – and Pay Tel Communications, Inc. ("Pay Tel") on the other – which alleged that "providers cannot practically and reliably determine the location of each called party" – the FCC identified "confusion" in the record with respect to this issue.[11] It accordingly offered "clarification," explaining "that the jurisdictional nature of a call depends on the physical location of the endpoints of the call and not on whether the area code or NXX prefix of the telephone number . . . are associated with a particular state."[12]

While the Commission rejected the idea that the jurisdiction of certain types of calls are inherently unknowable, it "agree[d] with Pay Tel that, to the extent an inmate calling services provider cannot definitively establish the jurisdiction of a call, it may and should treat the call as jurisdictionally mixed and thus subject to our ancillary service charge rules."[13] The attached Fourth Further Notice of Proposed Rulemaking proceeded to employ the new Rule to all ICS calls.[14]

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9 *See Report and Order* ¶¶ 36-37, 40, 43.

10 *See Report and Order* ¶ 46.

11 *Report and Order* ¶¶ 52-53.

12 *Report and Order* ¶ 53.

13 *Report and Order* ¶ 53; *see also* WC Docket No. 12-375, *Enforcement Bureau Reminds Providers of Inmate Calling Services that They Are Responsible for Complying with the Commission's Rules Relating to Those Services*, Public Notice, DA 20-1364 (rel. Nov. 20, 2020).

14 *Report and Order* ¶ 70.

III. THE COMMISSION SHOULD RECONSIDER A PORTION OF THE REPORT AND ORDER

In reviewing this Petition, the Commission should bear in mind that it does not constitute a broad attack on the conclusions advanced by the *Report and Order* or seek a wholesale appraisal of that release. GTL does not dispute the Commission's authority to regulate jurisdictionally mixed services according to the well-established "impossibility doctrine"[15] or its consideration of that principle in light of its determination of the jurisdictional characteristics of particular kinds of ancillary service charges.[16] GTL challenges only one sentence from the *Report and Order*: the notion that "the jurisdictional nature of a call depends on the physical location of the endpoints of the call and not on whether the area code or NXX prefix of the telephone number . . . are associated with a particular state."[17]

In addition to effecting a serious departure from prior practice without notice, the sentence in question confuses the distinction between the boundaries of the Commission's *jurisdiction — i.e.*, what it has the power to regulate — and the applicability of its ICS rules — *i.e.*, the applicability of its existing regulations. Even if the Commission is correct that the "endpoints" test has been used to mark the Commission's *jurisdiction*, telephone providers have long relied on telephone numbers or other proxies to determine how to rate calls and how to determine the applicability of other regulations. That error led the Commission to state an unworkable principle presenting economic, technical, and statutory concerns. It should be reconsidered and, ultimately, rejected.

A. The Rule Constitutes An Exercise Of Unreasonable Rulemaking

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15 *See Report and Order* ¶¶ 29-32.

16 *See Report and Order* ¶¶ 33-46.

17 *Report and Order* ¶ 53, n.143 (the "Rule").

The Commission's "endpoint" test for determining the Commission's *jurisdiction* has never been used to determine the applicability of the Commission's ICS rules — and for good reason. Such an approach is arbitrary, capricious, irrational, and likely unworkable.

As the D.C. Circuit has recognized, the Commission's use of the location-based end-to-end approach "to determine whether a call is within its interstate *jurisdiction*" does not necessarily justify using that same "analysis for quite a different [regulatory] purpose."[18] And, indeed, the Commission has never used its endpoint analysis for determining the applicability of its ICS rules for purposes of regulating ancillary service charges. Nor has the Commission ever stated that its interstate rate caps apply to the full extent of its jurisdiction. Presumptively, then, the governing test for determining how the Commission's rules apply — as distinct from the Commission's jurisdiction — is the call classification methodology utilizing NPA-NXX and related network information that has long been the industry standard.

1. The Rule Ignores Decades of Custom and Practice

The Commission justified its rejection of the NPA-NXX-based approach in part by denying that it has ever "adopted a general policy allowing" it in the ordinary course.[19] That is incorrect. The Commission's prior statements have recognized that using NPA-NXX *is* an appropriate industry standard for determining whether a call is interstate or intrastate. It has, after all, long been "*standard industry practice for telecommunications carriers* to compare the NPA/NXX codes of the calling and called party to determine the proper rating of a call," whereby "a call is rated as local if the called number is assigned to a rate center within the local calling area of the originating rate center" or a toll call if it "is assigned to a rate center outside the local calling area

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[18] *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1, 3 (D.C. Cir. 2000) (subsequent history omitted).

[19] *See Report & Order* ¶¶ 54-55.

of the originating rate center."[20]

2003's *Starpower Communications* is instructive in this regard.[21] In that case, Verizon challenged the classification of virtual NXX arrangements as "local service," observing that its tariff defined "telephone service furnished between customer's stations located within the same exchange area" – i.e., a classification based on the physical location of the calling and called parties.[22] The Commission rejected this argument, noting that Verizon's conduct in rating ISP traffic was dispositive; because Verizon "stipulated that, for rating and billing purposes, it considers the traffic at issue to be local under the Tariff," Starpower's ISP calls must be accorded the same treatment.[23] The Commission emphasized the weight of evidence against Verizon, including its *historical use* of NPA/NXX codes to rate Starpower calls; the *consistent use* of NPA/NXX codes in the local exchange carrier industry to jurisdictionally rate calls; Verizon's technical inability to identify virtual NXX calls based on physical location; and, most importantly, a lack of "evidence in this record that the parties proposed or discussed alternatives to the *industry-*

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[20] *Developing A Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685, ¶ 142, n.399 (2005) (emphasis added) (citing *Starpower Communications, LLC v. Verizon South Inc.*, 18 FCC Rcd 23625, ¶ 17 (2003) ("*Starpower*")).

[21] The *Report and Order* challenged GTL's citations to Notices of Proposed Rulemaking in this docket, stating that "[e]ven insofar as those Notices include observations about historical industry practice as context for those requests for comment, the Notices do not establish actual Commission policy." *Report and Order* ¶ 55. Yet such releases can obviously summarize well-established Commission precedent as a predicate to and support for such policy, without consigning it to the status of mere dicta. *See, e.g.*, WC Docket No. 19-308, *Modernizing Unbundling and Resale Requirements in an Era of Next-Generation Networks and Services*, FCC 20-152, ¶ 4 (rel. Oct. 28, 2020) (citing Notice of Proposed Rulemaking in summarizing competitive entry obligations imposed by the Telecommunications Act of 1996), n.10 (citing Notice of Proposed Rulemaking for the principle that "[p]arties may negotiate agreed-upon rates for [unbundled network elements], which the state must then approve"). For example, one of the Notices of Proposed Rulemaking cited by GTL and subsequently criticized by the *Report and Order – Developing a Unified Intercarrier Compensation Regime* – repeatedly cites *Starpower*, which, as a Memorandum Opinion and Order, cannot be disputed as an expression of "actual Commission policy." 20 FCC Rcd 4685, ¶ 141 (citing *Starpower* for fact that "[i]t is standard industry practice for telecommunications carriers to compare the NPA/NXX codes of the calling and called party to determine the proper rating of a call"), n.59 (citing *Starpower* for fact that "[t]elecommunications carriers typically compare the telephone numbers of the calling and called party to determine the geographic end points of a call, which may be relevant for jurisdiction and compensation purposes").

[22] *Starpower* ¶ 12 (internal quotation marks omitted).

[23] *Starpower* ¶ 13.

wide system of rating calls by NPA-NXX."[24]

The foregoing demonstrates that the Rule would prevent carriers from deploying a well-settled approach to determining the nature of ICS calls on the faulty basis that that approach was never approved. That mistaken premise is reason enough to grant the Petition.

2. The Rule Is Discriminatory

The Rule would be discriminatory even if it were permissible. When a service qualifies as a "telecommunications service" under the Act, the Commission has explained, jurisdiction (but not the specific rules that apply) is determined through application of the same end-to-end analysis, regardless of whether, for example, that service is provided by a facilities-based carrier or a reseller.[25] This neutral and uniform approach accords with the broad definition of "telecommunications services" under the Act, which are defined with respect to "transmissions," rather than types of telephone calls or provider characteristics.[26] Thus, to the extent the Commission wishes to revisit the way services are categorized as interstate or intrastate, there is no basis to do so only as to ICS providers.[27]

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[24] *Starpower* ¶¶ 16-17, n.62 (emphasis added) (noting Verizon Virginia Inc.'s acknowledgement "that rating a call based on the NPA-NXX code assigned to the customers is the established rating system used by all local exchange carriers, including Verizon Virginia."); *cf. Worldcom, Inc.*, 17 FCC Rcd 27039, ¶ 289 (2002) ("AT&T notes that Verizon itself compares originating and terminating NPA-NXXs when it decides whether to charge reciprocal compensation for completing calls from another carrier's customer to Verizon's FX subscribers. If the two relevant NPA-NXXs are within the same rate center, Verizon charges reciprocal compensation for its completion of the call, regardless of where a caller is actually located.").

[25] *See AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services; et al.*, 20 FCC Rcd 4826, ¶¶ 27-28 (2005); *see also Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, 7 FCC Rcd 1619, ¶¶ 8-16 (1992) ("*BellSouth*") (applying traditional end-to-end analysis to enhanced voicemail service, noting that a call to it qualifies as a "jurisdictionally interstate communication" and observing that it constitutes an "interstate telecommunications capability").

[26] *See* 47 CFR § 153(50), (53).

[27] *Cf.* WC Docket No. 12-375, *Rates for Interstate Inmate Calling Services*, Comments of Secured Perimeters International, 1 (Aug. 5, 2020) ("SPI Comments") ("implor[ing]" the Commission, "in conjunction with all other ITS vendors and industry specialists . . . not to change the traditional point-to-point call validation structure, or NPA/NXX Rate Center," given that it is "one of the few platform rules *consistent across and between* ICS vendors, Regional Bell Operating Companies (RBOC), tax vendors, and revenue reconciliation processes") (emphasis added). Note that the SPI Comments are associated with but not part of the record to the instant proceeding, pursuant to 47 CFR §§ 1.1203 and 1.1212(d). *See Notice of Prohibited Presentations in the Matter Of Rates for Interstate Inmate*

Yet the *Report and Order* singles out ICS providers on the grounds that the Commission "has never applied proxies to telecommunications resellers generally, or inmate calling services providers specifically, with respect to assessing different interstate and intrastate rates and charges on their customers."[28] This is a distinction without a difference, given that the end-to-end analysis upon which the Rule is grounded applies to all telecommunications service providers; the Commission, in other words, cannot target particular classes of telecommunications service providers in its rulemaking when the legal basis for it (and criticisms that undergird it) are of universal applicability.[29] Though the *Report and Order* claims that the "situation here is quite different" with respect to ICS providers' use of NPA-NXX jurisdictional proxies,[30] these entities rely upon them in the same manner as any other telecommunications service provider, as discussed in Section III.A.1, *supra*. And, again, the Commission's own thin record is to blame: mere unsubstantiated speculation on "potential differences" in the types or characteristics of ICS calls as a basis for distinguishing the use of NPA-NXX and related network information between ICS and non-ICS providers fails to alter this long-standing state of affairs.[31] Having failed to articulate any rational basis for the facially discriminatory treatment of ICS providers, this second

Calling Services (WC Docket No. 12-375), 35 FCC Rcd 9437 (2020).

[28] *Report and Order* ¶ 54.

[29] *Cf. Various Methods of Transmitting Program Material to Hotels and Similar Locations and Use of the Business Radio Service for the Transmission of Motion Pictures or Other Program Material to Hotels or Other Similar Points.*, 86 F.C.C.2d 299, ¶¶ 5-6 (1981) (eliminating "anti-siphoning" rules across all pay cable, subscription television, private radio, and multipoint distribution services per the absence of any "useful or public interest purpose" justifying discriminatory treatment, noting that with unequal application of such rules, "the public might lose entirely the benefits of these new types of communications systems"). Indeed, ICS providers seem a poor test subject for the Rule when, as the Commission observes, they "have not historically distinguished between interstate and intrastate ancillary service charges." *Report and Order* ¶ 48.

[30] *Report and Order* ¶ 56. In other words, the *Report and Order*'s attempts to distinguish between proxies employed for an "aggregate outcome" and those relied upon by ICS providers are unavailing, as proxies common to both ICS and non-ICS providers are used for per-call rating and routing functions. *Id.* Indeed, ICS providers' reliance on third-party telecommunications service providers – *see* Section III.A.3, *infra* – suggest that "carrier-to-carrier" matters are at the heart of the former's use of NPA-NXX codes, the *Report and Order* ¶ 54 notwithstanding.

[31] *Report and Order* n.156.

construction of the Rule is likewise untenable.[32]

3. The Report and Order Fails to Consider the Ability of ICS Providers to Implement the Rule

In addition to discriminating against ICS providers with respect to a selective application of the Rule, the *Report and Order* also fails to assess the ability of ICS providers to implement it.[33] While the record is understandably silent on this issue, given the lack of adequate notice-and-comment in this proceeding (*see* Section III.B, *infra*), there are good reasons to doubt ICS providers' ability to determine the physical location of every single recipient of telephone calls that originate in correctional facilities. That reality provides another reason to reconsider and withdraw the Rule: "[i]mpossible requirements imposed by an agency are perforce unreasonable."[34]

In 1996, incumbent local exchange carrier ("ILEC") Bell Atlantic Telephone Company ("Bell Atlantic") filed its comparably efficient interconnection ("CEI") plan unbundling basic payphone service pursuant to FCC order.[35] In its CEI, Bell Atlantic described its inmate calling services – including its use of one-way inmate network controlled lines – that, to the exclusion of all other outgoing calls, "restrict[ed] all originating calls to 0+ (automated) collect calls to a

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[32] *Cf. Beach Communications, Inc. v. FCC*, 959 F.2d 975, 986 (D.C. Cir. 1992) (rejecting Commission's discriminatory application of cable franchising requirements to various types of satellite master antenna television systems as violative of equal protection guarantees, per Commission's failure to demonstrate that its rule classified affected parties "'in a manner rationally related to legitimate governmental objectives'") (subsequent history omitted) (quoting *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981)).

[33] *Cf. BellSouth* ¶¶ 13-16 (describing technical and economic limitations in effectuating practical separation of voice mail service into interstate and intrastate components, which would culminate in "depriving customers of an interstate telecommunications capability they want" if ordered).

[34] *Alliance for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 940 (D.C. Cir. 1991).

[35] *Bell Atlantic Telephone Companies' Comparably Efficient Interconnection Plan for the Provision of Basic Payphone Services*, 12 FCC Rcd 4275 (1997) ("*Bell Atlantic*"); *see Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996; et al.*, 11 FCC Rcd 20541 (1996) (ordering Bell Operating Companies to file CEI plan describing proposed compliance with equal access parameters and nonstructural safeguards) (subsequent history omitted).

presubscribed intraLATA carrier or interLATA carrier."[36] Following public notice, a commenter challenged the sufficiency of the CEI, questioning whether Bell Atlantic's ICS would be offered to other carriers on a nondiscriminatory basis.[37] On reply, Bell Atlantic explained that while it did not intend to resell its ICS operator services on a deregulated basis, they would nonetheless "serve independent payphone providers and Bell Atlantic payphones on a non-discriminatory basis."[38] This proceeded from the way in which inmate calls were routed and billed:

> Bell Atlantic represents that, in most of its inmate facilities, it uses a store and forward technology to transmit the calls by contracting with a third party vendor that processes the calls for both Bell Atlantic and the presubscribed IXC using equipment owned by the vendor. Bell Atlantic claims that the vendor charges fees to both Bell Atlantic and the IXC for its services and delivers the message detail to each for billing purposes. Bell Atlantic notes that these calls are then billed in the same manner and at the same rates as collect calls generally. Bell Atlantic represents that the call processing in these instances is viewed as adjunct to Bell Atlantic's operator services.[39]

In other words, Bell Atlantic exclusively relied upon a third party for "communications between a subscriber and the network itself" for such functions as "call setup, call routing, call cessation, calling or called party identification, billing, and accounting."[40] These functions were under the control of an unrelated entity, such that they could be made available on a nondiscriminatory basis to all payphone service providers.

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[36] *Bell Atlantic* ¶ 6. Bell Atlantic also described a two-way inmate network controlled line, which "permit[ted] only directly dialed local or toll calls and 0+, 01+ and 011+ automated calls to the presubscribed intraLATA carrier or interLATA carrier" and allowed incoming calls. *Id.*

[37] *See Bell Atlantic* ¶ 74.

[38] *Bell Atlantic* ¶ 78.

[39] *Bell Atlantic* ¶ 78, n.234 ("When an inmate dials a 0+ automated call, the PSP, either in the set or through ancillary equipment, stores the number and redials the call as a direct dialed or 1+ call with a recording requesting that the called party signal acceptance of a collect call. The call is billed to the PSP by the carrier transporting the call at direct dialed rates. The store and forward method is transparent to the inmate placing the call as well as the recipient of the call who agrees to accept charges.").

[40] *North American Telecommunications Association Petition for Declaratory Ruling Under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, 3 FCC Rcd 4385, ¶¶ 11-12 (1988) (internal quotation marks omitted).

It is GTL's understanding that ICS providers, as successor-in-interest to the various ILEC subsidiaries that provided them, use a substantially similar model for the routing and billing of inmate communications. Calls placed in correctional facilities – whether to wireline, wireless, and Voice-over-Internet Protocol ("VoIP") numbers – are handed off to unaffiliated third-party telecommunications service providers that route them across the public switched telephone network to their appropriate termination point, based on the called number's entry in the Local Exchange Routing Guide ("LERG").[41] GTL further understands that ICS providers assess charges on inmate calls by purchasing access to third-party databases that classify them as intrastate, interstate, or international; these databases contain numbering resource assignments at the central office code (NPA-NXX) and thousands-block number pooling (NPA-NXX-X) levels, as well as other network information, but lack telephone line-level information.[42] While such numbering resource assignments can provide information on, for example, the function associated with a central office code (e.g., public mobile carrier), it does not provide actual geographical location associated with a particular device or service.[43]

To this end, the *Report and Order* notably fails to determine whether ICS providers have

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[41] *See* iconectiv, *Route It Right Every Time with LERG OnLine*, 2 (2019) (describing use of LERG for call rating and routing functions by "[w]ireline, wireless and interconnected VoIP service providers, competitive local exchange carriers, value-added resellers and other service providers"), https://iconectiv.com/sites/default/files/2019-11/TruOps_TRA_LERGOnLineBrochure.pdf; *cf. High-Cost Universal Service Support; et al.*, 24 FCC Rcd 6475, ¶ 275 (2008) (proposing uniform reciprocal compensation framework based on calling party service provider's delivery of call to the network edge of the called party service provider, defined as "the location of its end office, [mobile switching center], point of presence, or trunking media gateway, which PSTN routing conventions (e.g., [Number Portability Administration Center] or LERG) associate with the called party telephone number . . . .").

[42] *See, e.g.*, iconectiv, *TruOps Telecom Routing Administration Catalog of Product and Services*, 26, 29 (Sept. 2018) ("*TRA Catalog*") (describing scope of TPM™ Data Source used to route and bill telephone calls), https://iconectiv.com/sites/default/files/2020-08/TruOps_TRA_Catalog.pdf; *accord* iconectiv, *TruOps Telecom Routing Administration*, 1 (2019) ("*TRA Brochure*"), https://iconectiv.com/sites/default/files/2019-11/TruOps_TRA_Brochure.pdf.

[43] *See* iconectiv, *TruOps Telecom Routing Administration (TRA) LERG™ Routing Guide General Information*, 5-6, 20-21 (May 2, 2019) ("*TRA Routing Guide*"), https://trainfo.iconectiv.com/sites/microsites/files/2019-06/LERG_Routing%20Guide%20-%20General%20Info_05_01_18_new_5_31_19.pdf

the technological or administrative infrastructure to effectuate the definitive jurisdictional determination the Rule prescribes. Nor does it assess the central role played by the unrelated third parties upon which many providers apparently rely,[44] particularly as these entities offer classification products marketed as a means for ensuring compliance with Commission regulations pertaining to these functions.[45] Given indicia that classification determinations have, for decades, been under the control of entities over which many providers exercise no authority, critical logistical and financial questions present themselves, such as the costs attendant upon ICS providers should they be required to design, deploy, and implement an alternative call classification system.[46] Based on GTL's understanding of the present state of the

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[44] iconectiv, formerly known as Telcordia Technologies, Inc. and Bell Communications Research, Inc. ("Bellcore"), oversees the TruOps Telecom Routing Administration (TRA), which facilitates call and text message completion across the North American Numbering Plan and has, since 1984, served as a focal point for "routing, rating, billing and numbering assignments" for the telecommunications industry. Serving some 600 "wireline, wireless and interconnected VoIP service providers, competitive local exchange carriers, value-added resellers and other service providers," iconectiv leverages domestic and international data gathered from and submitted by numbering administrators and service providers to create a series of databases for applications like local calling area information, telemarketing, and alternative billing services. iconectiv, "corporate fact sheet" (Feb. 2018), https://iconectiv.com/sites/default/files/documents/iconectiv%20corporate%20fact%20sheet.pdf; *TRA Brochure* at 1-2; *TRA Catalog* at 1-9 ("Critical applications such as call routing, call rating and billing, numbering assignment processes, and nearly any application that utilizes TruOps Telecom Routing Administration's (TRA's) data on the Public Switched Telephone Network (PSTN) depend on having access to the accurate, timely, and comprehensive data provided by TRA data products. Data is also used by geographical information systems and applications, locator services, revenue assurance processes, financial services, customer relationship management, credit card services, least cost routing processes, call centers, law enforcement, mapping, and countless related types of services.").

[45] *See, e.g.*, *TRA Catalog* at 4 ("Numerous regulatory bodies, industry guidelines, and industry standards cite TRA products as necessary and critical to telecommunications products and services within the NANP. TRA works together with these groups to address completeness, accuracy, and consistency in as many areas as possible relative to the data it provides."), 5 ("Our ongoing interactions with industry service providers, regulators, industry standards groups, and other related services and products managed by iconectiv permit us to serve as a conduit to align your needs, questions, etc., with other companies, industry standards, and supporting applications, amounting to a win-win situation for all involved."), 9 (noting "array of products" utilized in "Regulatory/Legal support").

[46] *Cf. Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404, ¶ 29 (2004) ("*Vonage Order*") ("Indeed, Vonage would have to change multiple aspects of its service operations that are not nor were ever designed to incorporate geographic considerations, including modifications to systems that track and identify subscribers' communications activity and facilitate billing; the development of new rate and service structures; and sales and marketing efforts, just for regulatory purposes."); SPI Comments at 1 (because the current "calling structure also provides the basis in which a majority of the ICS vendors define their platform and facility rules so by altering this structure, changes would need to be made by each vendor for every correctional facility, including a complete rebuild of third-party tax files. These changes would be a monumental task and would potentially increase costs of existing IntraLATA calls through

telecommunications industry, the *Report and Order* opines broadly on the purported inaccuracy and lack of utility of current jurisdictional practices (and the apparent limitations of the LERG and related databases in light of modern communications technology), but tasks the wrong parties with addressing their defects. Those telecommunications service providers and call routing and classification vendors that facilitate the provision of ICS service are central to any meaningful action on jurisdictional reform.

4. The Report and Order Fails to Address the Impact of the Rule Upon State Governments

The *Report and Order* suggests the necessity of the Commission's rule proceeds from the deleterious effects of the status quo – the notion that "any other treatment of jurisdictionally indeterminate calls would strip interstate callers of the protections guaranteed by federal law."[47] This claim is, again, unsupported by any record evidence, such as an evaluation of the existence of equivalent (or more stringent) caps on ancillary service charges inherent in state law. It also fails to account for the enormous costs imposed upon ICS providers and consumers to effectuate it, assuming (*see* Section III.A.3, *supra*) that this is even possible. Evidentiary defects aside, however, this assertion impermissibly tramples on both the substantive principles of federalism and the benefits arising therefrom.[48]

First, as discussed in Section III.B, *infra*, the Rule is grounded on a legally impermissible expansion of the Commission's ancillary service charge regulation,[49] by which a rule founded on

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additional Universal Service Fund (USF) fees.").

47 *Report and Order* ¶ 53.

48 *See Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374-75 (1986) ("[W]e simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do.").

49 47 CFR § 64.6020.

the Commission's ability to regulate "[a]ll charges . . . for and in connection with [interstate] communication service" somehow affords it the ability to presumptively alter the manner in which telephone calls are determined to be interstate or intrastate. Such a construction impermissibly emphasizes regulatory aims over the clear dictates of the Act.

In 1984, *United States v. Western Electric Co.* established geographic areas called local access and transport areas ("LATAs") as part of the divestiture of the Bell Operating Companies from AT&T.[50] In some cases, these LATAs crossed state lines, such as in the situation "where a single statistical area itself extends across state boundaries."[51] Service within these LATAs is known as interstate, intraLATA service; in instances where such service involves calls between points within an exchange or an extended area and is covered by local exchange service charges (*i.e.*, a local call),[52] the Commission lacks jurisdiction over it per Section 221(b) of the Act.[53]

Whether a call is "local" for purposes of the foregoing is a determination made by state public utility commissions,[54] which frequently effectuate them with regard to jurisdictional proxies. The Public Utility Commission of Texas, for example, has held the calling party's

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[50] 569 F. Supp. 990, 993–94 (D.D.C. 1983) (dividing the continental United States into LATAs "generally centering upon a city or other identifiable community of interest" to facilitate exchange telecommunications and exchange access).

[51] *Application of Access Charges to the Origination and Termination of Interstate, IntraLATA Services and Corridor Services*, 57 Rad. Reg. 2d 1558, ¶ 3 (P&F) (1985) ("*Interstate, IntraLATA Order*").

[52] *Cf. Access Charge Reform; et al.*, 14 FCC Rcd 14221, ¶ 46 (1999) ("Telephone calls to destinations outside of the local calling area are toll calls subject to an additional charge. A LATA often encompasses more than one immediate local calling area, so intra-LATA calls can be either local or toll calls.").

[53] *Interstate, IntraLATA Order* ¶¶ 3, 6, n.13; *see* 47 U.S.C. § 221(b) (divesting Commission of jurisdiction over telephone exchange service "charges, classifications, practices, services, facilities, or regulations" in cases "where such matters are subject to regulation by a State commission or by local governmental authority," notwithstanding that a portion of such service constitutes interstate communication).

[54] *Interstate, IntraLATA Order* n.13 ("The distance at which a local call becomes a long distance toll call is determined by state regulatory bodies.") (citing *Western Electric Co.*, 569 F. Supp. at 995); *cf. Petition of the South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company for Waiver to Provide Account Code Billing*, 7 FCC Rcd 3504, ¶ 9 (1992) (distinguishing "local exchange services offered pursuant to intrastate tariffs" provided across state lines as amenable to state authority under Section 221(b)).

location, as ascertained through its NPA-NXX, and the called party's location, as ascertained through its NPA-NXX, wholly dispositive for determining the jurisdiction of a call.[55] Arkansas has also predicated jurisdictional determinations on NPA-NXX codes, augmented with "reasonably available" information as negotiated between carriers.[56] Other states have relied on such arrangements in varying degrees.[57]

In foreclosing the use of NPA-NXX proxies for determining the applicability of ancillary-charge rules, the Commission risks constraining the authority of state public utility commissions to determine the locality of calls within cross-state LATAs via proxies and effectively obviates existing and lawful reliance on such proxies within state-ratified interconnection agreements and tariffs.[58]

The *Vonage Order*, which the *Report and Order* cites for the Commission's broad

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[55] Public Utility Commission of Texas Docket No. 33323, *Petition of UTEX Communications Corporation for Post-Interconnection Dispute Resolution with AT&T Texas and Petition of AT&T Texas for Post-Interconnection Dispute Resolution with UTEX Communications Corporation*, Arbitration Award, 113 (June 1, 2009).

[56] Arkansas Public Service Commission Docket Nos. 08-076-U, *Petition for Arbitration by Sprint Communications Company, L.P., Against Yelcot Telephone Company*, 08-077-U, *Petition for Arbitration by Sprint Communications Company, L.P., Against Northern Arkansas Telephone Company*, Order, 25-26 (May 22, 2009).

[57] *See, e.g.*, Minnesota Public Utilities Commission Docket No. P-421/C-05-721, *Complaint of Level 3 Communications, LLC, Against Qwest Corporation Regarding Compensation for ISP-Bound Traffic*, Recommendation on Motions for Summary Disposition, 3 (Jan. 18, 2006) ("Carriers in Minnesota have historically used, and continue to use, the NPA/NXXs of the calling and called parties to determine whether a call is rated as a local or as a toll call and whether reciprocal compensation or switched access charges apply to the call."); New York Public Service Commission Cases 00-C-0789, *Proceeding on Motion of the Commission Pursuant to Section 97(2) of the Public Service Law to Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements between Telephone Companies*, 01-C-0181, *Verizon New York Inc. has filed tariff revisions to introduce rates and regulations for intraLATA local traffic between the company's meet point with an ITC and the company's point of interconnection with a CLEC*, Order Denying Petitions for Rehearing, Clarifying NXX Order, and Authorizing Permanent Rates, 4-5 (Sept. 7, 2001) ("The only standard that must be met is that established in the LERG which requires calls to be rated based on the NPA-NXX of the called number, not the customer's physical location.").

[58] While GTL itself observes uniform ancillary service charge maximums without regard to jurisdiction – and does not challenge the application of federal ancillary service charge caps "to all calls that a provider identifies as interstate and to calls that the provider cannot definitively identify as intrastate," *Report and Order* ¶ 70 – the Rule's effect on ICS providers that do not is notable. For all calls, including those placed within a cross-state LATA, the *Report and Order* mandates that federal ancillary service charge caps will apply if an ICS provider cannot definitely establish its jurisdiction. Yet under existing state allowances for the use of NPA-NXX codes, an ICS provider may simultaneously adjudge it to be local and thus amenable to state ancillary service charge caps, if any. The *Report and Order* promulgates no framework by which to reconcile these mutually exclusive outcomes.

authority over state power in cases of "difficulty in directly determining the jurisdiction of calls"[59] fails to rehabilitate the Rule. While the Commission did consider and reject the use of various jurisdictional proxies with respect to determining the origination and termination of VoIP calls,[60] it ultimately exercised its preemption powers pursuant to its refusal to classify the service at issue as a telecommunications service under the Act.[61] In other words, the *Vonage Order* took prospective steps with regard to an emerging technology subject to a unique status under the Act; it made no findings on the then 20 year-old use of NPA-NXX and related network information by telecommunications service providers nor states' ability to compel the use of NPA-NXX under powers reserved to them under the Act.

Second, while the *Report and Order* predicates the Rule on the ostensible benefits accorded ICS consumers from a broad application of "the protections guaranteed by federal law," it ignores the far more damaging harms to *all* telecommunications end users from the Rule's potential impact on state communications program. As described above, the Rule portends a possible reclassification of all telecommunications traffic that relies on NPA-NXX and related network information as interstate; states are likewise divested of the ability to employ NPA-NXX jurisdictional classification methods under Section 221 of the Act. Such a sudden and pronounced jurisdictional shift in large portions of intrastate and interstate intraLATA traffic will sap funding for state emergency communications, Telecommunications Relay Service, and administrative recovery mechanisms. The classification of calls as interstate or intrastate determines how the revenue received for each call must be reported for federal and state reporting purposes to assess contribution obligations for federal and state programs. Inasmuch as

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59 *Report and Order* ¶ 56.

60 *See Vonage Order* ¶¶ 26-27.

61 *See Vonage Order* n.46; *cf.* 47 U.S.C. § 153(1), (25), (36); 47 CFR § 9.3.

the Commission has recognized a role for the states with respect to jurisdictionally flexible subjects such as 911/E911 or Voice-over-Internet-Protocol services,[62] it "cannot employ means" in promulgating rules "that actually undercut its own purported goals."[63] Reasoned rulemaking, precedent holds, requires an agency to "consider all of the relevant factors and demonstrate a reasonable connection between the facts on the record and the resulting policy choice."[64] The *Report and Order*, with its speculative insistence on the primacy of interstate ICS caps and lack of analysis on subsidiary effects, fails to accomplish this.

B. The Rule Violates Statutory Notice and Comment Procedures

In stating that NPA-NXX codes are an insufficient basis for categorizing calls for the purposes of application of the Commission's ancillary service charge rule, the Rule constitutes an "imposition of requirements that affect subsequent [agency] acts and have a future effect on a party."[65] It was thus incumbent upon the Commission to observe the notice requirement of the Administrative Procedure Act ("APA") prior to its promulgation, affording "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."[66] The Commission's failure to do so requires reconsideration of the Rule.

1. The Report and Order Constitutes Rulemaking without Statutorily Mandated Notice

Under the APA, notice must include "either the terms or substance of the proposed rule or

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62 *See, e.g., IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers,* 20 FCC Rcd 10245, ¶ 5, n.95 (2005).

63 *Office of Communication of United Church of Christ v. FCC*, 779 F.2d 702, 707 (D.C. Cir. 1985).

64 *Aeron Marine Shipping Co. v. U.S.*, 695 F.2d 567, 577 (D.C. Cir. 1982) (quoting *Sierra Club v. Costle*, 657 F.2d 298, 323 (D.C.Cir.1981)) (subsequent history omitted).

65 *Sprint Corp. v. FCC,* 315 F.3d 369, 373 (D.C. Cir. 2003) (internal quotation marks omitted), *staying mandate* 2003 WL 1877308 (2003).

66 5 U.S.C. § 553(b)-(c).

a description of the subjects and issues involved."[67] This is "designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review."[68] In practice, notice "must not only give adequate time for comments, but also must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully."[69]

In *GTL*, the D.C. Circuit was unable to "discern from the record whether ancillary fees can be segregated between interstate and intrastate calls;" it therefore "remand[ed] the matter to the FCC for further consideration."[70] The *Public Notice* accordingly sought "specific comment on whether each permitted ICS ancillary service charge may be segregated between interstate and intrastate calls and, if so, how." The sole focus of this request was on the treatment of "fees that appear ancillary to making calls"[71] – absent from both *GTL* and the *Public Notice* was any mention of a reexamination of the methodology used to determine whether a call or charge is interstate or intrastate for purposes of applying the ancillary service charge limitations. The Rule was therefore clearly not a "logical outgrowth" of the subject of the matter of the *Public Notice.*[72] As a result stakeholders were improperly "deprived of the opportunity to present relevant information" prior

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67 5 U.S.C. § 553(b)(3).

68 *International Union, United Mine Workers of America v. Mine Safety and Health Administration*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

69 *Florida Power and Light Co. v. U.S.*, 846 F.2d 765, 771 (D.C. Cir. 1988), *cert.* denied, 490 U.S. 1045 (1989); *see also Market Synergy Group, Inc. v. U.S. Department of Labor*, 885 F.3d 676, 681 (10th Cir. 2018); *Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1319 (8th Cir. 1981).

70 *GTL*, 866 F.3d at 715.

71 *More Data Sought on Extra Fees Levied on Inmate Calling Services*, 28 FCC Rcd 9080 (2013).

72 *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) (internal citations omitted); *see Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994) ("Something is not a logical outgrowth of nothing. The notice of proposed rulemaking contains nothing, not the merest hint, to suggest that the Department might tighten its existing practice of allowing substitution. Substitution is neither discussed nor mentioned. The subject is not touched upon in any of the rules proposed.").

to its adoption by the Commission.[73]

The *Report and Order* contends that its "approach" in this matter "simply clarifies the long-established standard that inmate calling services providers must apply in classifying calls," and is thereby exempt from notice-and-comment requirements. Specifically, the *Report and Order* emphasizes the *Public Notice*'s reference to the treatment of "jurisdictionally mixed" ancillary services as providing stakeholders "notice of, and a full opportunity to comment on, the jurisdictional status of inmate calling services calls."[74] But again, this fails to address the fundamental difference between the Commission's announced focus on the treatment of fees ancillary to calls *already* classified as interstate or intrastate and the question of *how* to classify those calls for purposes of applying the ancillary service charge limitations in the first instance. A final rule is not a logical outgrowth of a public notice "where interested parties would have had to divine the Agency's unspoken thoughts,"[75] and cannot stand, as here, on a formulation mentioned fleetingly or obliquely in a notice of proposed rulemaking.[76]

The Commission's thin justification for its new rule proves the lack of notice. In suggesting that there would be "costs" associated with a hypothetical coterie of mobile phone users

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[73] *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) (internal quotation marks omitted); *cf. Shell Oil Co. v. EPA*, 950 F.2d 741, 747 (D.C. Cir. 1991) ("If the deviation from the proposal is too sharp, the affected parties will not have had adequate notice and opportunity for comment.") (subsequent history omitted); *see, e.g., Amendment of Part 101 of The Commission's Rules to Modify Antenna Requirements for the 10.7 - 11.7 GHz Band; et al.*, 22 FCC Rcd 17153, ¶ 24 (2007) (rejecting proposed spectrum reclassification due to impact on small licensees and applicants deprived of the "opportunity for meaningful and informed comment").

[74] *Report and Order* ¶ 58.

[75] *Council Tree Communications, Inc. v. FCC*, 619 F.3d 235, 250 (3d Cir. 2010) (quoting *International Union*, 407 F.3d at 1260) (subsequent history omitted); *see Shell Oil*, 950 F.2d at 751; *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 170-71 (2d Cir. 2013) (collecting authorities on Commission "solicitations . . . too general to provide adequate notice" that a particular rule was under consideration).

[76] *Environmental Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005) ("If the APA's notice requirements mean anything, they require that a reasonable commenter must be able to trust an agency's representations about *which particular* aspects of its proposal are open for consideration.") (emphasis in original); *cf. Shell Oil*, 950 F.2d at 751 (final rule cannot be the "logical outgrowth" of proposed action that is grounded on "ambiguous comments and weak signals from the agency" that denies an "opportunity to anticipate and criticize the rules or to offer alternatives"); *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991).

engaged in regulatory arbitrage,[77] the Commission was unable to point to any actual data regarding the existence or magnitude of such potential costs – precisely because the Commission has never put these issues before the public and providers never had the chance to explain how calls are rated one way or another. This tautological justification is, at heart, an unlawful "surprise switcheroo on regulated entities,"[78] unforeseeable from both the substance of the *Public Notice* and the state of the record before the Commission.

The *Report and Order* suggests that the *Public Notice*'s references to the treatment of jurisdictionally mixed calls constitutes sufficient notice for the purpose of promulgating the Rule.[79] But as courts have repeatedly recognized, an agency cannot justify facially deficient notice by forcing the public to engage in an attenuated "guessing game," in which commenters are expected to draw ever-more specific inferences and conclusions from a general statement of proposed rulemaking. In *Fertilizer Institute,* the D.C. Circuit dismissed the notion that a specific reference to statutory exemptions also provided general notice concerning other exemptions "only remotely related to the first specific one."[80] *Council Tree Communications* held a proposed rulemaking on new designated entity qualifications insufficient to support a rule addressing existing qualifications; "inferential notice" from the fact that qualifications had always been uniform was untenable, particularly where, as here, "no commenter manifested an understanding" commensurate with that of the Commission.[81] The fact that no commenters on remand even saw the need to address how calls are classified is compelling evidence that no one was on notice that

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77 *Report and Order* n.156.

78 *Environmental Integrity Project*, 425 F.3d at 996. .

79 *See Report and Order* ¶ 58.

80 935 F.2d at 1311 (dismissing the idea of a causal chain "in which the inclusion of one subject indicates that a distant cousin of that subject might be addressed").

81 619 F.3d at 256 (citing *Wagner Electric Corp. v. Volpe*, 466 F.2d 1013, 1019 (1972)).

the Commission might address that issue. Similarly, the Commission's supposition that providers have *always* used the endpoints approach to determine how to apply the Commission's ICS rules[82] lacks any basis in the record (or in historical fact), as explained *supra* Section III.A.

In the context of the Rule, a passing reference to the universe of permissible ancillary service charges does not suggest that the Commission would address the classification of the calls that are related to them, as evinced by the lack of any such understanding in the comments submitted pursuant to the *Public Notice.* Short of an attenuated chain of suppositions and inferences, no party to the *Public Notice* could have reasonably anticipated the conclusions reached by the Commission.[83]

2. The Report and Order Fails to Justify its Promulgation of a Rule without Statutorily Mandated Notice

The clear lack of notice associated with the Rule cannot be cured through a fleeting reference to the *Public Notice*. While the *Public Notice* does solicit comment on measures the Commission might take to ensure "that providers of interstate ICS do not circumvent or frustrate the Commission's ancillary service charge rules,"[84] this proscription against deliberate end-runs around the ancillary service charges regulations has no relevance to ICS providers' heretofore *lawful reliance* upon existing methods for categorizing calls for purposes of the ancillary charge rules. The Commission cannot use an open-ended pronouncement on regulatory integrity as an invitation to engage in unfettered rulemaking; agencies are bound by law to delineate the "the range of alternatives being considered with reasonable specificity" under the APA.[85]

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82 *Cf. Report and Order* ¶ 57 ("[N]or has [the Commission] ever had any reason to suspect that inmate calling services providers were not appropriately . . . determining the proper jurisdiction").

83 *See Covad Communications Co. v. FCC*, 450 F.3d 528, 548-49, n.10 (D.C. Cir. 2006).

84 *Public Notice*, 35 FCC Rcd at 191.

85 *Small Refiner Lead Phase-Down Task Force v. U.S. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983); *cf. Rates for Interstate Inmate Calling Services*, 28 FCC Rcd 14107, 14219 (Dissenting Statement of Commissioner Ajit Pai)

Nor does the *Report and Order*'s use of a solitary comment rehabilitate its lack of compliance with the APA. Its citation to Pay Tel's initial comments as a broad predicate for the Rule[86] notably ignores their context, which focused on the purported unreliability of mobile telephone numbers in the context of single-call fees.[87] In any case, courts have repeatedly inveighed against agency attempts to "bootstrap notice from a comment,"[88] lest notice turn "into an elaborate treasure hunt, in which interested parties, assisted by high-priced guides (called 'lawyers'), must search the record for the buried treasure of a possibly relevant comment."[89] In *National Black Media Coalition v. FCC*, for example, the Second Circuit rejected a change predicated on a suggestion in a comment, reasoning that "notice" of this sort would enable agencies to avoid "alerting any of the affected parties to the scope of the contemplated change, or its potential impact and rationale, or any other alternatives under consideration."[90]

Finally, characterizing a fundamental change to the classification of ICS calls as a "clarification" is unavailing. As the D.C. Circuit explained in *Environmental Defense Fund*, "it

("But a jejune request for comment on 'any other proposals' did not apprise stakeholders that rate-of-return regulation was under consideration. This omission matters. The D.C. Circuit has instructed that '[a]gency notice must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision-making.' And the Second Circuit just recently chided the Commission for 'solicitations ... too general to provide adequate notice that a [particular] rule was under consideration.'").

86 *Report and Order* ¶¶ 52-53.

87 *See* Pay Tel Communications, Inc., Comments, WC Docket No. 12-375, at 9-10 (Mar. 20, 2020).

88 *Small Refiner*, 705 F.2d at 549 ("The APA does not require comments to be entered on a public docket. Thus, notice necessarily must come—if at all—from the agency."); *but see NRDC v. Thomas*, 838 F.2d 1224, 1243 (D.C. Cir. 1998) (finding that EPA statements and public comments "gave industry participants a clear opportunity to" dispute the nascent final rule) (subsequent history omitted).

89 *Small Refiner*, 705 F.2d at 550 ("Inevitably, many parties will not attempt this costly search and many others will fail in their search. The agency will not get the informed feedback it needs, the parties will feel unfairly treated, and there will be a meager record for us to review."); *cf. American Federation of Labor and Congress of Industrial Organizations v. Donovan*, 757 F.2d 330, 340 (D.C. Cir. 1985) (declining to "attribute notice to the other appellants on the basis of an assumption that they would have monitored the submission of comments," per only two comments received on the proposed regulation out of 1600 total submissions).

90 791 F.2d 1016, 1022-23 (2d Cir. 1986).

is the substance of what the [agency] has purported to do and has done which is decisive."[91] That case dismissed the EPA's characterization of an "exemption of a whole class from prescribed obligations required by law for the protection of the public" as a "statement of agency policy," noting that "[a]ny claim of exemption from APA rulemaking requirements will be narrowly construed and only reluctantly countenanced."[92] Here, the Rule "jeopardizes the rights and interests"[93] of all telecommunications service providers. That compels strict adherence to notice-and-comment provisions, which the Commission failed to do.

IV. CONCLUSION

For the foregoing reasons, GTL requests that the Commission grant its Petition.

Respectfully submitted,

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[91] *Environmental Defense Fund v. Gorsuch*, 713 F.2d 802, 816 (D.C.Cir.1983) (quoting *Chamber of Commerce of United States v. OSHA*, 636 F.2d 464, 468 (D.C.Cir.1980)).

[92] *Environmental Defense Fund*, 713 F.2d at 816-17.

[93] *American Hospital Association v. Bowen*, 834 F.2d 1037, 1039 (D.C. Cir. 1987) (quoting *Batterton v. Marshall*, 648 F.2d 694, 708 (D.C.Cir.1980)).